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IN THE

Supreme Court of the United States

October Term, 1965

No. 818

GEORGE HOPSON and REBECCA B. REYNOLDS, Administratrix of the Estate of FREDERICK CLEMENT REYNOLDS, Deceased,

Petitioners,

vs.

TEXACO, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Does A Common Carrier, An Independent Contractor Licensed By And Operated In A Foreign Country, But Not Owned, Operated Or Controlled By An American Shipowner, Become An Agent Of That Shipowner [As A Matter Of Law Under The Jones Act] When Employed To Transport Crew Members Undergoing Repatriation From That Foreign Country?

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BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Texaco, Inc., respectfully prays that petitioners' application for a Writ of Certiorari to review the final judgments of the United States Court of Appeals for the Fourth Circuit, entered on September 15, 1965, be denied.

The Opinions of the Courts Below, the Jurisdictional Requisites and the Statutes Involved are correctly and adequately set forth in the Petition.

Respondent disagrees however with the Question Presented as it is stated in the Petition. The issue considered in both the District and Circuit Courts is:

QUESTION PRESENTED

Does A Common Carrier, An Independent Contractor Licensed By And Operated In A Foreign Country, But Not Owned, Operated Or Controlled By An American Shipowner, Become An Agent Of That Shipowner [As A Matter Of Law Under The Jones Act] When Employed To Transport Crew Members Undergoing Repatriation From That Foreign Country?

STATEMENT OF THE CASE

The factual evidence and findings on which both lower Courts' decisions were made, were not in dispute in the District Court nor contested in the Court of Appeals. They are not expressed with complete accuracy in the Petition and thus a Statement of the Case is necessary.

The S/S TEXACO WISCONSIN, owned and operated by Texaco, Inc., and on which George Hopson and Frederick Reynolds were employed, was loading petroleum in a foreign country (Trinidad) when those crew-members were taken sick and had to be repatriated. The ship master requested the local ship's agent to arrange transportation to the American Consulate in Port-of-Spain, (38 miles distant) for the actual discharge of these seamen before that official as required by American statute.

The ship's agent (Texaco-Trinidad, Inc.) also owns the very large refinery at which the ship was loading and within the bounds (fence) of which there is a large infirmary where its own employees as well as crew-members of visiting ships receive medical treatment and hospitalization. This infirmary is within a mile of the boat or launch landing where ships crews come ashore from the vessels which actually load at mooring dolphins located off-shore.

For transportation to the infirmary or anywhere within the bounds (fence) of the refinery, Texaco-Trindad furnishes vehicles of its own, but for any transportation beyond its boundary or fence, and on the Trinidad public highways, the ship agent always employs one of two public taxi services operated from San Fernando, the nearest town. (District Court Ruling, Appendix B, Page-4a, Petition; Court of Appeals Opinion, Appendix C, Page-16a, Petition; Appendix hereto, *Infra,* Page 1a).

There was no evidence that a taxi had been used two days earlier to transport Hopson and Reynolds from the boat landing to the infirmary—all within the refinery fence.

Neither the shipowner nor its agent owned, operated or controlled the taxi (Abhiram's Taxi Service) which was employed to transport Hopson, Reynolds and the ship-master to the American Consulate. (Trial Judge's Ruling, Page -4a, Appendix B to the Petition).

There was no "standing arrangement" with the taxi company for any transportation, and there was no evidence that the taxi company was used to "shuttle" seamen to the infirmary or elsewhere. (District Court Ruling Appendix B, Page-4a, Petition; Court of Appeals Opinion, Appendix C, Page-16a, Petition; Appendix hereto, *Infra,* Page 1a-4a).

While en route to the Consulate, the cab was involved in a collision in which the ship-master and crew-member

Reynolds were killed and crew-member Hopson and the cab driver were seriously injured.

Upon trial of the Jones Act suits filed by Hopson and by Reynolds' Estate, the shipowner contended that its sole duty was ordinary or reasonable care in the selection of the taxi, an independent contractor whose negligence, if any, could not be imputed to Texaco under any theory of law. The District Court found no dispute in the evidence, held that the shipowner did not own, operate or control the taxi, declined to permit the jury to consider whether the shipowner had used reasonable care in selecting the taxi and ruled as a matter of law that the taxi was the shipowner's agent. Therefore the sole and narrow issue submitted to the jury was whether or not the cab driver had been guilty of any negligence which contributed in any degree (even the slightest) to the fatal accident.

Upon appeal from adverse jury verdicts and judgments rendered on that narrow issue, the Court of Appeals for the Fourth Circuit, (Judges Boreman and Bryan for the majority and Judge Sobeloff dissenting) reversed the District Court's ruling and held that in the absence of any conflicting evidence, the cab driver was an independent contractor whose negligence could not be imputed to the shipowner.

REASONS WHY A WRIT SHOULD BE DENIED

I. The Petition Seeks A Re-Determination Of Fact.

The first point on which petitioners rely for allowance of a writ, (Petition, Page-5) seeks to bring the factual findings of both the District and Circuit Courts within the scope of *Sinkler v Missouri Pacific* R.R. Co., 356 U.S. 326,

78 S. Ct. 758, 2 L.Ed. 2d 799 (1958). Those factual determinations were undisputed in the Trial Court and uncontested in the Court of Appeals. Thus this Court will be required to review the evidence, to reverse both the Trial and Appellate Courts' determinations of fact and to find on uncontested evidence, (1) that the taxicab company was "regularly employed" by the shipowner [Petition, Page-3], (2) that the shipowner "had a standing arrangement with the cab company for the transportation of persons beyond the refinery enclosure, pursuant to which the cabs were used on a daily basis," [Petition, Page-3], (3) that the shipowner used the taxi service "to shuttle" seamen to an infirmary or elsewhere about Trinidad [Petition, Page-5], and (4) that the shipowner "controlled" the taxi service. Unless such a re-determination of fact is accomplished, petitioners cannot come within *Sinkler's* scope.

The fact that these are Jones Act cases is immaterial to this Court's reticence to review and reverse undisputed factual conclusions.

> "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on *disputed* questions of fact and in drawing inferences from proven facts has been respected." *Wilkerson* v *McCarthy*, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949) at 3436 U.S. 70-71.

As the evidence was undisputed and the factual conclusions have heretofore been uncontested, the petition, which requires a factual review and reversal, should be denied.

II. There Is No Conflict With Any Prior Decision Of This Court.

Petitioners' contention that the Fourth Circuit's decision is in direct conflict with *Sinkler v Missouri Pacific R.R. Co.*, 356 U.S. 326, 78 S. Ct. 758, 2 L. Ed. 2d 799 (1958) is entirely without merit.

In *Sinkler* (1958) this Court ruled that an apparent independent contractor, organized by a domestic railroad to perform switching of that railroad's trains, fifty-percent owned by that railroad and subject to the control and supervision by that railroad in performing the details of its work, and which had been conducting a vital part (switching) of the railroad's regular and essential operational activities (the assembly and break-up of trains) on a daily basis since 1905, became an "agent" of the railroad within the scope of 45 U.S.C. §51, The Federal Employer's Liability Act. Here, however, we are concerned with an irregular and isolated act of repatriation of American seamen from a foreign country.

In *Sinkler* this Court created a doctrine of operational activities and expressly pointed out, (Footnote #2) that the Trial Court had submitted the issue of "control" over an independent contractor to the jury which had found against the railroad. Thus the Trial Court in *Sinkler* reached an exactly opposite finding of fact than the Trial Court and the Court of Appeals reached in petitioners' cases.

In *Ward v Atlantic Coast Line R. Co.*, 362 U.S. 396, 80 S. Ct. 789, 4 L. Ed. 2d 820, (1960) this Court described *Sinkler* as being a situation in which the operational activities were "required" to carry out the carrier's franchise. In *Mazzucola v Pennsylvania R.R. Co.*, 281 F. 2d 267, 91

A.L.R.2d 518 (3rd Cir.-1960) footnote 4, Page 270, the Third Circuit indicates that the activities must be "crucial" to the franchise.

Thus petitioners seek certiorari not only to re-determine the facts but to rule that the operation of shore-side transportation in a foreign country is a crucial activity necessary and essential to the operation of an ocean-going ship.

Obviously a shipowner cannot carry his own shore-side transportation from one port to another, nor can he own, operate or control shore-side transportation facilities in every port and country in the world. That type of activity simply is not "required" nor "crucial" to the shipowner's franchise.

On the other hand, domestic railroads, (as in *Sinkler*, as in *Leek v Balt. & Ohio R.R.*, 200 F. Supp. 368, [N.D., W. Va. 1962] and as in *Garney v Pittsburgh & Lake Erie R. Co.*, 316 F. 2d 277, cert. den. 375 U.S. 814, 84 S. Ct. 45, 11 L. Ed. 2d 49 [3rd Cir. 1963] both discussed hereinafter), can and do own, operate or control "independent contractors" which perform daily, crucial, operational activities that are essential to the maintenance of the franchise.

Therefore *Sinkler, Carney* and *Leek* are neither relevant nor controlling and there is no conflict with any prior decision of this Court.

III. There Is No Conflict With Any Other Circuit.

The contention under Point II (Page 10, Petition) that the Fourth Circuit's decision is in conflict with *Carney v Pittsburgh & Lake Erie R.R.*, 316 F. 2d 277, cert. den. 375 U.S. 814, 84 S. Ct. 45, 11 L. Ed. 2d 49 (3rd Cir.-1963), and with *Southern Ry, v Fox*, 339 F. 2d 560 (5th Cir.-1965) is equally without merit.

In *Carney* the railroad contracted over a long period of time for the Y.M.C.A. in a distant town to provide room and board for the railroad's line-crews that were working regularly at a job-site in that town. All monthly bills were sent directly to the railroad which was obligated to furnish room and board to its employees. The plaintiff fell out of a defectively prepared bed and sued the railroad which was held liable for the negligence of its "agent" [the Y.M.C.A.] in maintaining the railroad's employees at the job-site. Undoubtedly the same result would be reached if a ship's crewmember was caused to fall out of his bunk due to the defective manner in which the room-steward had made-up the bunk. Such a result would be consistent because the crewmember's maintenance on the job-site - on the ship - would be vital to the physical operation of that ship. But the return - the repatriation of a seaman from a foreign country is not vital or crucial to the operation of the ship. Indeed, the vital thing is that the remaining seamen have to perform more work to keep the ship *in operation*. This was recognized by the California Court in *Mangrum v Union Pacific R.R. Co.*, 41 Cal. Rptr. 536, 230 A.C.A. 1033 (Cal. Dist. Ct. App.-1964), [discussed at Page 13 of the Petition], which states that "a railroad [ship] cannot *operate* properly without a full healthy crew."

Consequently there is no conflict between the Third Circuit and the Fourth Circuit's decision herein.

In *Southern Ry. v Fox*, a distributor of mimeograph machines (The Mimeograph Company) was engaged by the railroad to train and instruct railroad employees in the use and operation of a machine that printed passenger tickets for use throughout the Southern Railway System. Such tickets, of course, are essential to the operation of the railroad and maintenance of the franchise.

Fox, a railroad employee who had been trained and instructed by the distributor, was injured when he attempted to clean the machine while it was running. The Fifth Circuit observed that the railroad would be vicariously liable for the distributor's employees' negligence, if Fox had not been properly instructed in the use and cleaning of the machine. In reversing a judgment for the plaintiff on other grounds, however, the Court stated that the railroad was not an insurer of its employees while on duty but owed only the duty of reasonable care to furnish reasonably safe conditions, tools and appliances. Obviously no parallel can be drawn between *Fox* and the Petition. In anything, *Fox* teaches that the shipowner is not an insurer of its crewmembers while they are on duty, but owes only the duty to furnish reasonably safe conditions of work (transportation). Thus there is no conflict between the Fifth Circuit and the Fourth Circuit's decision herein.

The remaining case on which petitioners rely is *Leek* v *Baltimore & Ohio R.R.*, 200 F. Supp. 368, (N.D., W. Va. 1962) cited at Page 12 of the Petition. This District Court opinion was not appealed.

In *Leek* the railroad had contracted for over twelve years with a taxi company to transport a change of train crews every day between the railroad's main yards (where they were required to check in and out) and a switching yard (where they actually began and terminated active work) - a distance of approximately 20 miles. There was no question about the railroad's control over the twelve-year period. As *Sinkler* had held "switching" to be a "vital operational activity" of railroading, it was only logical that *daily transportation* of the switching crews (from the required check-in and check-out point to the site of actual

work and return) would likewise be a "vital operational activity" of a railroad. Thus the taxi was held to be an "agent" of the railroad.

There can be no correlation between *Leek* and the Petition. One involves a domestic railroad engaged in daily transportation over a twelve-year period in order to accomplish the switching - [the make-up and break-up of trains] - an operational activity that is essential to the franchise. The other involves an irregular and isolated occurrence - the use of a publicly licensed taxi in a foreign country to perform repatriation, a collateral function which is not "required" or "crucial" to the actual operation of a ship.

Consequently, *Carney, Southern Ry. v Fox* and *Leek* are not in point factually or in principle. Therefore there is no conflict with any other Circuit.

IV. The Court Of Appeals Decision Is In Accord With The Second Circuit, The Texas Court Of Appeals And With Applicable Principles Established By This Court.

There are two cases, *McCall v Overseas Tankship Corp.*, 222 F. 2d 441 (2nd Cir.-1955) and *Premeaux v Socony - Vacuum Oil Co.*,144 Tex. 588, 187 S. W. 2d 690, (Cir. Ct. App. - Texas - 1945) Aff'd., 192 S.W. 2d 133 (S. Ct. Texas - 1946) which are directly in point.

In *McCall,* a seaman discharged in Shanghi, was killed in a Northwest Airlines plane crash during the repatriation trip. The Second Circuit rejected the contention that the Airline's employees were *pro hac vice* servants or agents of the shipowner under the Jones Act and ruled that the shipowner's duty was to exercise ordinary and reasonable care in selecting a carrier to perform the transportation. Consequently, the Airline was an independent contractor

whose negligence was not imputable to the shipowner. The Court further ruled [222 F. 2d 441 at 444] that even if the seaman had not been discharged but had continued in the shipowner's employ during repatriation, the *pro hac vice* (agency) doctrine of the Jones Act would not apply.

In *Premeaux* the seaman fell sick on a foreign voyage and was repatriated on a ship of another company. He sued his employer under the Jones Act for injury allegedly resulting from improper care furnished him aboard the repatriating vessel. Deciding that the repatriating vessel was an independent contractor and could not be held to be an agent of the seaman's employe for the purpose of permitting the action under the Jones Act the Court said:

187 S.W.2d 690 at 698:

> "The Jones Act, by referring to and adopting relevant portions of the Federal Employer's Liability Act, 45 U.S.C.A. Sec. 51 et seq., which makes the employer liable for the negligence of his officers, agents and employees, may have enlarged the employer's liability in some instances (*DeZon v American President Lines,* 318 U.S. 660, 63 S. Ct. 814, 87 L. Ed. 1065), but not where an independent agency has been employed. An independent contractor is not an officer, agent or employee within the meaning of the Federal Employers' Liability Act, at least, where the employer's duty is not absolute. *Chicago, R. I. & P.R. Co. v Bond,* 240 U.S. 449, 36 S. Ct. 403, 60 L. Ed. 735; *Robbinson v Baltimore & O. R. Co.,* 237 U.S. 84, 35 S. Ct. 491, 59 L. Ed. 849; *Klar v Erie R. Co.,* 118 Ohio St. 612, 162 N.E. 798; *Rexroad v Western M.R. Co.,* 162 Md. 566, 160 A. 730; *Reynolds v Addison Miller Co.,* 143 Wash. 271, 255 P. 110.

The duty to furnish a seaman a safe place to work is not absolute and an employer is not an insurer of his employee's safety. On the contrary, the employer's duty is to exercise reasonable or ordinary care to provide its employees a safe place to work. *Wilkerson v McCarthy, et al, Trustees*, 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (1949). *Ellis v Union Pac. R. Co.*, 329 U.S. 649, 67 S. Ct. 598, 91 L. Ed. 572 (1947). *Bailey v Central Vermont Ry.*, 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, (1943).

Petitioners ask this Court to ignore *McCall* and *Premeaux*, to reverse the foregoing principles and to hold (1) that there is a duty to furnish an absolutely safe place to work (thus becoming an insurer), and (2) that as a matter of law, a shipowner's employment of a licensed common carrier (taxi) in a foreign country to perform an isolated instance of transportation over that foreign country's public highways, does not meet the test of reasonably safe facilities for a seaman's use.

To accept petitioners contention is to rule that a shipowner, faced with repatriation of an ill crew-member from a foreign country, may not delegate the performance of that repatriation to a foreign-licensed independent common-carrier which the shipowner does not own, operate or control, without the shipowner becoming an insurer of that common carrier. Petitioners cite no cases to support this contention!

Consequently the Question Presented (Infra, Page 2) has already been answered by the Second Circuit, by the Texas Court and by applicable principles established by this Court and the Fourth Circuit's decision is in accord therewith.

CONCLUSION

The grant of a writ of certiorari will require a re-determination of facts that were not disputed in the District Court nor contested in the Court of Appeals. There is no conflict with any prior decision of this Court nor with any decisions in any other Circuits and the decision of the Court of Appeals is in accord with existing precedent.

Accordingly the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Excerpts from testimony of Arthur Rupert Carte as printed at pages 6a through 14a, Appendix, Petitioners' Brief in Fourth Circuit.

Pages 6a - 7a

Q. Mr. Carte, in connection with the transportation of ship's personnel, captains, crew members and so forth, does the Texaco Trinidad Incorporated have any automobiles of its own in the Marine Department for use?

A. No.

Q. Does not?

A. No.

Q. Well, how do you provide transportation for ship's captains and ship's personnel?

A. Well, if it's for the company, such as going to a medical hospital or medical center, the company does provide a car from the transport, but if it goes beyond the company's fence, outside the company's property, we always use taxis.

Q. And where do you get those taxis?

A. From San Fernando.

Page 14a

Q. Now, Mr. Babalas asked you how Abhiram was paid his—I ask you is he paid for each individual trip that he makes?

A. Yes.

Q. And the same with any other taxi company that you use?

A. Yes, sir.

Q. Then is the charge for that trip billed to that particular ship?

A. Yes, sir.

Q. And that ship's voyage into this port?

A. Yes, sir.

Q. Its a disbursement for the ship?

A. Yes, sir, it's charged to the ship's account.

Excepts from testimony of John Abhiram as printed at pages 24a through 30a, Appendix, Respondent's Brief in Fourth Circuit.

Pages 24a - 25a

Q. What's your name?

A. John Abhiram.

Q. Where do you live?

A. 32 Crichlow Street, San Fernando.

Q. At that address, do you live there?

A. Yes, sir.

Q. What all do you do there?

A. I run a taxi service.

Q. You keep your office and garage and run a taxi stand there?

A. Yes, sir.

Q. What business are you in?

A. Taxi.

Q. You say you're in the taxi business, how many taxis do you have?

A. Three.

Pages 28a - 29a

Q. Now, in your taxi business, for whom do you provide taxi services or transportation?

A. Well, I provide for whoever give the job; Texaco, Shell, Huggins Limited.

Q. Do you stay on a regular payroll for Texaco?

A. Oh no.

Q. How are you paid?

A. I'm paid by the job.

Q. By the job?

A. Yes, they give me one call or two calls for the week or three calls and I get paid by the call; whatsoever job I do for them.

Q. Now, when you are called for example from Texaco Trindad, which is here, what instructions do they normally give you at the time of a call?

A. Well, they give—if they want a car, the Marine or Shipping Department there, they call home and say they want a car at such and such time at the Shipping Office. When you go there, they give the instructions. What you have to do is take officers or papers to the Consul.

Q. Incidentally, do you know if Texaco Trinidad uses any other taxi operators?

A. Yes, sir.

Q. Then you don't get all of their business, do you?

A. No.

Pages 95, Line 18

Q. Do you pick up the general public with the taxi?

A. Oh yes. When I say pick up, only when I get a call. I don't run up and down the road.

Page 30a

Q. There are only two companies or two individuals that do work for Texaco for taxi driving?

A. Yes, sir.

Q. And do you have an agreement?

A. No, sir.

Q. Do you have an oral agreement with Texaco?

A. Well, sir, how do you say that again?

Q. Oral agreement?

A. What's oral, I don't understand what it means.

Q. Not in writing?

A. Not in writing.

Q. What's the oral understanding between you and Texaco?

A. Well, they give me business because they know I can carry out the business safely.

Q. The method of payment, do they pay you on each trip?

A. Each trip.

Q. Do they pay you by cash or by check?

A. They pay by voucher that you got to cash.